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ABSTRACT

Although medical malpractice suits are based on a model of treatment of an individual by a professional, educational malpractice suits are based on a group treatment model. When the medical model and the teaching model are compared, the contrasts are so great that medical malpractice principles are not a reliable guide to the emerging law of educational malpractice. The models contain different professional-client relationships, different settings for professional practice, different interpretations of the duty of care owed to the plaintiff by the defendant, and different requirements for diagnosis and treatment. They also have different kinds of control over the conditions of service and different spans of control, and the two occupations have different standing in common law. Both kinds of cases, however, require demonstrating the complaint, cause of action, duty of care, proof of injury, and relationship between the negligence and the injury. Decisions will be difficult until there is more professional agreement about what constitutes nonnegligent diagnosis and treatment of the learner, although negligence is clear regarding diagnosis and referral of students with learning difficulties. One alternative to malpractice suits may be the use of administrative law. (Author/JM)

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LEGAL IMPLICATIONS OF MODELS OF INDIVIDUAL AND GROUP TREATMENT BY PROFESSIONALS

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Introduction

Educational malpractice suits have come into prominence recently in spite of the fact that no court has as yet awarded judgments based on it in elementary or secondary education. The precedents are not favorable to one seeking remedy for professional negligence in education. In four cases, the plaintiff failed to state a cause of action. A fifth case, the Daniel Hoffman case was not, according to the judge who wrote the opinion, an educational malpractice case, but is one of failure of a system to follow its own stated procedures, or of due process. The plaintiffs sought and were awarded substantial remedy for the negligence of a school system to follow educational diagnostic procedures mandated in the district's own policies. The award by the trial court was reduced on appeal, but the judgment was sustained.

The Peter W. complaint alleged misrepresentation, but without showing reliance proved by the plaintiff on the misrepresented facts.[1] Here no link between the misrepresentation and harm to the plaintiff was shown. A duty of care flowing from teacher to student to protect the student from harm was recognized, but the court distinguished the physical duty of one case from the principle of academic duty of care.[2]

The Donohue complaint was much more comprehensive, alleging failure of duty of care in diagnosis of his learning ability, informing his parents of his difficulties, provisions for adequate facilities and personnel to teach him, and failure to adopt accepted professional standards and methods to treat the plaintiff's problems.[3] All elements of the complaint were relevant to a professional duty of care, but the plaintiffs stated a second

cause of action resting upon statutory duty of care.[4] The court, using the Cardozo reasoning in Moch v. Rensselaer Water Co., disagreed with the plaintiff's argument, and stated that the statutes which are not designed to protect against injury but are designed to confer a benefit upon the general public, do not provide a basis for cause of action by an individual who seeks to recover damages for their breach.[5]

Showing of a breach of professional duty of care requires a cause of action, which rests on the facts of the case. The provision for showing a breach of professional duty of care requires a definition of the duty ordinarily owed to the plaintiff by a member of that profession, under those circumstances. The standard of care is one which professionals of that occupation or specialty agree upon or recognize widely. Consensus either evidenced by widely employed practice of the method or widely held opinion about how to treat the client's problem is necessary to establish the standard of care applicable under the circumstances of the case.

Statutory duty of care rests upon a mandatory standard established by law. The standard can be explicit, as a process for diagnosis of the learner required in P.L. 94-142, or implicitly, the court may conclude from the language of the statute that a certain standard of care is imposed for certain kinds of learners. Statutory duty of care arises from legislation, and the clear expectation of lawmaking body and courts, not from the consensus of professionals concerning "best practice". It might arise from a common law expectation of adequate and fair treatment, or the concern that a newly recognized and critically important profession or occupation serve the public with due care.

Elson in his commentary on the Peter W. and Donohue cases stated that the court findings in both instances reflected a confusion in application of the "reasonable person" principle and the "prudent professional" principle.[6] The standard of due care for the former requires than an average person in a similar situation would be expected to act with due care toward the students in that person's care. The application of that principle is not one of a trained professional acting under the given circumstances of a case, but of an average adult in the same setting and circumstances. The application of the reasonable person principle, he points out, is more appropriate in cases involving anticipated physical harm, and is a lower expectation of care due the student.[7] Applying a standard of professional care is more appropriate in cases concerning diagnosis and treatment of learners' special requirements, because the exercise of judgment is not that of an average untrained lay person unfamiliar with pedagogy.

The Peter W. court, however, made exactly that distinction in rejecting the plaintiff's claim. The opinion made the distinction on the basis of the difficulty in choosing what methodology was most appropriate under the circumstances set over in the complaint.[8]

The Hoffman court in New York found for the plaintiff on the grounds of negligent acts committed by the school district in failing to reevaluate the plaintiff, and in doing so "imposed additional and crippling burdens upon a student."[9] Justice Shapiro in his opinion classified the action as negligence, but distinguished it from the line of educational malpractice suits. It is difficult not to classify the case outside the educational malpractice suits as the negligence was a failure to apply a professional standard of care.

Medical Malpractice Principles and Educational Malpractice

Medical malpractice principles have been building since at least 1871.[10]

The judgment in the Peter W. case, the first in the line of educational malpractice, was handed down in 1976. There is a large body of cases referred to as medical malpractice law, while the paucity of educational malpractice cases is very small. The medical malpractice cases number in the thousands, but are concentrated in areas of high population density where the ratio of physicians per 100,000 population is among the highest in the country and the concentration of medical specialists likewise the highest.[11] The five educational malpractice suits as of March, 1979, were brought in New York (2), California, Florida and Iowa.

This paper will review certain principles of medical malpractice law and their applicability to educational malpractice issues. It is difficult to refer to a medical malpractice model or theory, because the law varies from state to state. The few educational malpractice cases all cite the Peter W. case as a precedent, so one can more easily summarize and classify the opinions. What is most perplexing about educational malpractice is the difficulty courts have, and commentators, in coming to grips with what may not be a recognized profession. Negligence action which students or their parents have brought in physical injury all have involved the reasonable person standard of care, similar to the care expected of reasonable adults must exercise to any other minor person.

Professional-Client Relationship

The relationship of the professional to the client is a fundamental principle in malpractice law. In medicine, the physician-patient

relationship is usually held to be a contract.[12] The contract can be explicit, with the patient and physician agreeing upon a kind of treatment, or the contract can be implied as is the case of a physician accepting a telephone call from one who desires to get the physician's advice on a personal medical problem.[13] A doctor cannot terminate arbitrarily a relationship with a patient who still is in a medically dependent state.[14] The ability of the patient to pay does not affect the existence of the contract or the physician's liability for negligence.[15] A physician can refuse to see a new person who wishes to have medical advice or treatment, unless the situation is an emergency and no other care is available.[16] Nor is a physician required to have consultations with patients in their homes if his practice ordinarily exludes them,[17] or in locations outside the physician's own community.[18] The physician has the right to determine the times and frequency of appointments.[19] The patient who has been accepted by the physician for care is an "invitee" to the office.[20]

The relationship of the teacher to the student is still recognized in common law as "in loco parentis" to the student. A person who is between the ages of 6 and 16 must attend some school in every state. Parents can decide which school the student will attend, even to the point in some states of providing instruction at home provided it meets state standards.[21] The state, as "parens patriae", insists on the education of the young in school, and this right is recognized as being in accord with the federal consititution. Nearly all state constitutions require that the state provide for a free and efficient system of public schools.

A teacher has a contractual relationship with a school district to carry out professional duties in accord with state law. All district rules and regulations are included in the teacher contract whether or not explicitly stated.[22] This includes the duty to accept the assignment of students to the teacher for classes in subjects in which the teacher is certified, at hours and in numbers determined by administrative agents and offices of the school district. Contracts between bargaining units of teachers and districts are recognized in some states as validly affecting the "conditions of employment."

Courts have not recognized public school teacher - student relationships as contracts,[23] even though teachers refer often to a certain methodology of assignments to students as contracts. Parents who send their children to non-public schools enter into a kind of contract to allow such schools greater latitude in control over the students than public schools. Students of compulsory school age are neither "licensees" nor "invitees" to the school premises.

The relationship of teacher to student is almost random, depending upon the circumstances of pupil residence and assignment of teacher to school and classrooms within the district. The pupils' parents can choose public or non-public schools, but cannot choose among public schools, unless alternative types of schools as offered by the district. Choices of such schools, usually "magnet" schools, are very limited. Residence ordinarily determines which school the child will attend, and research on school finance shows the historic relationship between excellence of public school and income in the school's drawing area. That inequality persists in spite of judicial efforts to create a greater balance between "poor" and "rich" schools.

Choices of the patients for physicians are limited by the number of available physicians. The rural areas offer few choices for patients. But the physician has some choice as well, whether he will accept the patient; he assesses his patient load to determine how many patients to whom he can give proper attention. Only in an emergency must a physician who is available to the patient accept that patient.

The medical relationship is a one to one situation, with both parties usually giving some consideration to the benefits and drawbacks of the proposed contract between them. Classroom teachers have few choices, and those are usually exercised informally, over which students are assigned them. The total number of students and number of students per class is usually beyond the power of the teacher to determine. Collectively, the teachers may negotiate for student loads and number of classes.

The teacher's relationships with students are mainly collective. Only a small proportion of the teacher's time is spent with individual students. Brophy and Good showed that in classrooms the verbal relationships are highly selective, arbitrary, almost whimsical, but are related to teacher's perceived socio-economic status of the student and the student's racial characteristics.[24]

As attempts were made to change professional roles by establishing teaching teams, more contacts with small groups and individuals became possible.[25] The greatest amount of teacher time, by far, is spent with groups even in teamed or differentiated settings. The assignment of students to a teacher is critical for the students, but the assignment is to a group, taught by the teacher. The student competes for attention, and is not guaranteed any defined amount of time with the teacher alone. Any

case alleging teacher negligence must take into account that any one student has no more right to special attention than any other, so the question must be asked in a case whether others like the plaintiff have been similarly negligently treated. A related question is whether a greater amoung of attention spent on the plaintiff could have caused educational injury to other students in the class to which the plaintiff belonged. By contrast, the medical relationship is one focusing the physician's entire attention, even for a short time, on the patient's problem.

The Setting for Professional Practice

The physician is liable for negligence in his own practice. He treats patients individually. Mistakes in diagnosis and treatment are results of his personal judgments. The doctor's office is the normal setting for the physician's practice. The employees of a physician's office are under his direction, so under the master-servant principle, the employees are servants. The employees of a physician who perform negligently, under the direction and in accordance with the wishes of the physician, make the physician liable for their negligence.[26]

In the hospital setting, a nurse is a hospital employee, as are non-professionals. The physician does not take his employees into the hospital. The care given by a nurse routinely to patients in a hospital does not bring a physician into negligence action.[27] However, if the hospital nurse acts under the direct and personal control of the physician and performs negligently, the physician is liable under the "borrowed servant" rule.[28] The physician is presumed to know whether the nurse carrying out his orders is incompetent. In the operating room a surgeon is presumed to

be "captain of the ship". All hospital employees in the operating room are presumed to be competent in the opinion of the surgeon. Most states consider all negligent acts occurring during an operation the responsibility of the surgeon even though the nurses or intern may have carried out a faulty sponge count, for example, leaving one in the patient's stomach.[29] The anethesiologist, however, is considered to be independent of the surgeon considering questions involving negligence in applying anesthesia.[30]

Hospitals are liable for the negligence of their employees under the "respondant superior" principle.[31] If the employees are temporarily under the direction of a physician in the hospital, that physician is responsible for their negligent acts. Physicians, interns, or residents employed on salary by the hospital are usually not liable for negligent acts, but the hospital is. Hospitals increasingly are being held liable for for negligent acts of contract physicians in emergency rooms.[32] Statutes of limitations usually apply to physicians' negligence, rather than the hospital's.[33]

Statutes concerning immunity of publicly owned hospitals vary widely among states from complete immunity from negligence suits to no immunity from negligence suits.[34] The Federal Tort Claims Act forbids negligence suits to be brought against hospitals owned by the federal government by armed service personnel or U.S. Public Health personnel, but allow non-military patients to bring negligence suits against such hospitals.[35] Some states allow charitable immunity from negligence suits to hospitals not operated for profit, but there has been no immunity for profit making hospitals.[36] In the case of institutions protected by statutes from

negligence suits, their employees who deliberately commit negligent acts, or acts of battery, are not immune from suit.[37]

Governmental immunity no longer protects public school boards in some states from negligence suits, so in states such as Pennsylvania, a district can be sued for negligent acts involving physical injury for students.[38] In states where school districts have governmental immunity, employees are liable for their negligent acts which cause injury to students. In the Peter W. case, the court recognized the liability of the district in negligence cases, but stated that the plaintiff must plead "every fact material to the existence of statutory liability" to state a cause of action.[39]

A particular teacher was not the focus of the Peter W. or Donohue cases in California and New York. Difficulties in identifying a particular teacher for educational negligence include the following:

1. The student has many teachers in one year, making apportionment of negligence difficult.
2. Models of staffing used in the same school may vary within the same school over the time a student is in the school, from an autonomous classroom model to a complex team model.
3. Testing of discrete skills gained over short periods of time is often not done. Tests often are used which apply to a wide variety of skills gained over several months' time. Standardized tests, commercially prepared, often are invalid in that they test for content and skills not taught prior to the test administration. Pre- and post-testing is often not done, thus making impossible an assessment of what the student knew before the teachers began their work.

In negligence actions, the institution may be liable for knowingly hiring or retaining an employee who was incompetent or unfit.[40] If the employee is acting within the scope of the recognized and stated duties in performing the negligent acts, the employer's liability is established. Proof of proximate cause of the employee's acts for the injury must be established. The application of the first principle has great potential in future educational malpractice cases. The principle of failure to follow the advice of district professionals or district policy in diagnosing a student is powerful. The Hoffman case involved this principle.[41]

It would appear that educational malpractice cases brought by students of public institutions would have to state a cause of action against the institution in such jurisdictions where statutes or courts allow it. Unlike medical malpractice cases, a cause of action would be more difficult to show against specific teachers. Educational malpractice suits brought against proprietary educational institutions would have to be brought using breach of contract principles.

Procedures for Action in Negligence

The legal process in malpractice cases, medical and educational, is similar. The elements include:[42]

1. A complaint brought by a plaintiff against the physician or institution.
2. A cause of action must be stated, or the case will be dismissed.
3. A duty of care folowing from defendant to plaintiff must be shown to establish a cause of action.
4. A cause of action requires proof of injury by the plaintiff.

5. Proximate cause of the injury resulting from negligent or deliberate acts by the defendant must be shown to establish a cause of action.
6. If a cause of action is stated to the satisfaction of the court, the court proceeds to the discovery period, in which information is exchanged by lawyers of the plaintiff and defendant.
7. Once the issues are drawn the judge may call a pretrial conference in order to settle the matter. If the matter is not settled at this conference, the case can move to a trial with a jury.

The duty of care owed to the plaintiff was not shown to the satisfaction of the Peter W. and Donohue courts.

Standard of Care

A duty of care owed to the plaintiff by a defendant must be shown to establish a cause of action. Failure to exercise care due the client institutes negligence in any action. Damage or harm caused to the plaintiff as a result of the action of the defendant must be shown to be negligent or a breach of the duty of care. The damage to the plaintiff must be a proximate or direct cause of the negligent breach of duty.

The standard of duty of care is traditionally that of the "reasonable person." If a reasonable person acted in the way the defendant acted no negligence can exist, as there has been no breach of the duty of care. In negligence actions brought against professional persons, such as physicians, lawyers, and architects, the standard of the reasonable person becomes that of the "duly careful members of the profession."[43] A physician may be liable for not knowing what to do in the circumstances, if a reasonably

prudent physician should have known what to do.[44] The physician may be found negligent for not applying the kind of diligence in applying skill or knowledge that an average member of the profession would exercise. The physician is expected to keep abreast of new developments in medicine; ignorance is no defense against negligence.[45]

The standard of care expected of teachers in cases involving injury to students is still that of the reasonable person and not that of the average diligent member of the profession. The actions brought which alleged a breach of a professional standard of care were not successful. The courts did not recognize a professional duty of care existing in those states, and the reasonable person duty of care was an insufficient ground for action in educational malpractice.

Members of a medical profession have the choice of using one of several approved methods of treatments of a patient with a certain problem.[46] The plaintiff must show that the treatment used was applied negligently, even if hindsight shows that another method would have produced better results.[47]

The Peter W. opinion stated that there were many views on appropriate or preferable pedagogy, including laymen's.[47] The court seemed to dismiss the principle of many acceptable methods, each of which must be applied non-negligently. In so doing the court did not look for professional consensus concerning many possible methods of treatment. Teaching was not recognized by that court as a profession.

The Federick L. case, brought successfully against the Philadephia School system,[49] and the Hoffman case,[50] both relied on breach of statutory duty of care. That standard is not a professional one. Application of it makes violations of statutes or regulations of a state or

any subdivision of it liable for negligence.[51] An unexcused violation of a statute or regulation which is adopted by the court as defining the standard of conduct is negligence itself.[52]

The standard of care imposed by statute or regulations of a state or any subdivision of the state can require students to be tested at certain intervals, the breach of which was negligence in the Daniel Hoffman case.[53] Failure to provide for special treatment for a student or class of students with a learning disability was found by a federal court to be negligence, but not necessarily carrying damages on the part of the Philadelphia School District.[54]

Statutes require teachers to be certificated, and to maintain certification by taking additional courses. Certification does not guarantee any more than competence enough to be hired for a position for which one is certificated. The competence question is another step, which in some states requires annual evaluation by an administrator.[55] Presumably, if the teacher is not given a less than acceptable evaluation, the teacher is competent, in such states. The common law appears not to expect a standard of competence higher than the state insists upon by means of certification and acceptable performance as recorded on evaluation instruments. The physician must statisfy the state standards for licensing as well as continuing education if the state requires it, or if the professional association requires it in order to maintain the all-important membership in the medical association.

Statutes requiring testing for competency in certain skills at certain grades, along with communication of results to students or parents, followed by classification and treatment of students falling below certain

levels of competence impose a statutory duty of care. Until the courts recognize teaching as a profession embracing various recognized "Schools" or kinds of methods, the breach of statutory duty of care appears to be the only grounds recognized by courts for bringing actions in negligence. The negligence alleged in such cases will continue to be of school districts rather than of teachers. There are no "reasonable person" standards of professional care. Statutory duty of care is not argued in medical malpractice cases because the professional standards are clear, and expert witnesses can be relied upon to prove their existence. Standards of care for specialists are different from those expected of average professionals. The standard of care for medical specialists is of the average prudent specialist, and rests on presumption of a higher level of skill and knowledge than that expected of physicians. Anesthesiologists are expected to know more than physicians concerning anesthesia and its application. In the educational occupations, school psychologists and school nurses may be judged according to standards of care appropriate to their specialties.

Diagnosis and Treatment

Failure to use appropriate tests on which a correct diagnosis could be made is the basis of many court decisions in which negligence was found. Courts distinguished between error in diagnosis, which is excusable, legally, and failure to use the "scientific means and facilities open to him for the collection of the best factual data from which to arrive at a diagnosis."[56] This diagnosis may consist of failing to discover a disease

the patient has, or telling a patient who is free of a certain disease that that person has such a disease.

A patient is expected to cooperate in answering the physician's questions; the medical practitioner is not a clairvoyant. Hence an uncooperative patient may not prove that his physician was really negligent. The principle of exercise of due care is the fundamental principle according to which the physician is to be judged.

In order for a physician to be found negligent, the misdiagnosis must, of course, be established factually as the proximate cause of the injury to the patient. The diagnosis to be judged a misdiagnosis must be admitted to be so by expert witnesses who say that the methods used were usual and correct in the circumstances.

A physician is expected to use the diligence and skill ordinarily used by average physicians in treating an illness. If an unexpected or untoward result occurs in the course of applying recognized treatment, diligently and carefully administered, the physician is not liable.[57] Physicians are not recognized as "curers" under the law, and cannot be held as insurers of a patient's well being. Before applying experimental treatment, the patient or guardian must be told why it is necessary, and in detail what the risks are in recovery, and what side effects might be expected.[58] This is particularly important when the patient might respond to conventional treatment, or when there is no emergency.

As in diagnosis, the patient must cooperate by following the physician's directions, or negligence will be imputed to the physician for complications developing in a patient who doesn't follow directions.[59] A patient must be informed sufficiently so as to be able to consent to an

operation, or other treatment. It follows from a basic civil right that every person has a right to action against a physician who has applied treatment to the patient without consent. The relationship between patient and physician is a fiduciary relationship, binding the latter to full disclosure to the former of all relevant facts.[60] This relationship evolved in common law, while the right to decide whether to submit for treatment is a right in natural law foritfied by constitutional and statutory enactments. Informed consent is a principle which is now becoming the rule. It places on the physician the necessity of disclosure of risks.[61]

In order for the patient to comply with the instructions, these must be explicit, detailed, and carefully given. Further, the physician takes the patient as he is, and must take into account the intelligence, age and maturity, enotional and mental state, and language. Verbal as well as written instructions may be necessary for the patient to understand the need for follow up or continuing treatment. The burder of making sure the patient understands is the physician's,[62] whether that means finding someone in the family or an outsider to communicate in the patient's language,[63] or making sure that an adult understands the treatment follow up process for a child or early adolescent patient.[64]

An emergency situation may be a defense to a physician who had to apply a known and familiar treatment, and had to act quickly without time for lengthy diagnosis.[65] But the physician must, in a negligence case, face the burden of showing that the situation was an emergency, and that the emergency was not brought on by the physician's own negligent acts.[66] The emergency principle does not totally exempt the physician from

communicating to the patient if the latter is of sound mind and conscious, or if not, with a guardian or relative, or even a policeman, if no other near relative is present, in order to obtain some kind of consent for treatment. Ordinary care is due the patient; the circumstances may be unusual but the canons of diligence and skills applied with care are the right of the patient even in an emergency.

Teaching is regarded more as a custodial occupation by courts than as a profession with recognized "schools" or accepted bodies of methods which experts can agree upon. Prestigious compendia such as the Encyclopedias of Educational Research or the two Handbooks of Research on Teaching are examples of attempts to bring together knowledge on teaching, but which yield very little in the way of treatment of the learner of any substance on which there is some consensus. Perhaps the principles of reenforcement, that it be for specific learning, that it be quickly given, and in recognizable form, comes closest to being scientifically based, widely understood teaching technology. Yet there are many teachers and researchers who disdain the principles and condemn the architects of behaviorism and reinforcement such as Watson and Skinner. It is a common law principle, as well as a primary rule of thumb among teachers, that a teacher must establish control or discipline over the pupils entrusted to her.[67] Perhaps the most common reason for expulsion of teachers is that they cannot control their charges. Until recently, it was a rare charge for dismissal that the teacher was "inefficient" as a teacher, or lacking in know how. Cooperation of the student must be secured by the teacher's control of the classroom.

The question of effectiveness has been tested in the Peter W. and Donohue cases, as well as in older cases.[68] Medical practitioners do not guarantee results, but careful, skilled treatment. In the educational malpractice suits, proof of damage to the students was in part presented by the plaintiff's poor performance after years of schooling. The proof of effectiveness after treatment was presented to show damages to the plaintiff, who as a consequence was denied good jobs and adequate income to support himself. Schools have long been held to a standard of a safe and healthy place for students, not necessarily as places where they will learn.

Treatment in teaching consists of methods selected which are supposedly appropriate to the maturity and mental level, of the student. In the history of mankind, seldom have teachers used methods or content which is necessarily interesting to the child. If it is possible to draw a similarity in teaching from the professional medical principles, it is that the teachers will use an accepted, widely used method. Few teachers can be accused of being innovative. No accusations of experimentation or innovation were alleged in the educational malpractice suits.

Research in education has not had a powerful influence upon teachers; the reason which has been accepted, has been in accordance with the teacher's own perceptions of the "reality" of the classroom.[69] Some of the attempts put into practice have been imposed from above with the effect on the teacher being an overload. Teachers who attempted to comply with the planned research application resisted after attempting to cope with the additional expectations.[70] In the 1970's more of the federally funded reaseach was directed to policy of state, federal and local organizations which called for no change in the classroom, and which was

disseminated only to libraries and a handful of officials. The growing cost and difficulty of obtaining the reports of these "policy" findings made the research virtually unattainable. Since it was mainly an exchange of information between a handful of non-university grantee organizations and the granting agencies, its usefulness or application was, in any case, nearly non-existent.

The most powerful legal principle in the school is that of "in loco parentis". A teacher who holds the place of the parent is free to apply whatever methodology she likes in the classroom. From this principle comes the notion that the teacher knows what is best for the child and will do the best for the child. Given only these common law principles, there is no need for a teacher to apply a method with due care expected of the ordinary professional. No information to students concerning the treatment is required under the "in loco parentis" principle. Nor is diagnosis prior to assignment to a method necessarily required for the average student.

Given the lack of professional standing of the teacher, and the lack of professional consensus on kinds of treatment or diagnosis, it has fallen to statutory law to define the parameters of diagnosis and treatment of certain kinds of students. The question of efficacy is very difficult to determine in teaching. Research does not establish which methods are most effective in teaching a group of children mathematics or reading, in the same sense that children gain more over a period of time. Much research in curriculum tends to show that a proposed method is not harmful, or is at least as good as the method against which it is compared. Null findings are most common. Given that state of the science or art, there appears to

be little danger of liability of parents or children not being fully informed about the risks of being assigned to an experimental method.

Students with special learning problems ranging from mild to severe were excluded from schools or were isolated in special settings, once admitted, in a large number of states until the PARC[71] and Mills[72] cases in the 1970's. The courts in several states forced schools to admit and provide treatment for such students. With the enactment of P.L. 94-142, the federal government insured every child access to the least restrictive learning environment, preceded by careful diagnosis.[73] This law attacked the problems of treatment of the below normal and gifted student, but the many students who are near average in intellectual skills are so far untouched by this federally imposed duty of care.

Many states, among them California and New York, have enacted legislation requiring periodic testing for all children and assignment to special treatment for those falling below a certain level.[74] That the courts and legislative bodies began to impose a duty of care on schools for special learners is not surprising. Taking the task of imposing some kind of professional and scientific discipline on what still is largely a folk institution, the courts and legislatures replaced school boards.

The courts and legislative bodies have begun the reformation of the school in order to accommodate the most difficult learning cases; it is not unreasonable to suppose that those students under the large middle portion of the normal curve will also receive the attention of these law-making branches of the government.

Another example of a legislated professional standard for schools is the Family Information and Privacy Act.[75] Prior to the enactment of this

law in 1974, it was the rare school which communicated anything about the student other than grades for courses in which the student was enrolled. Most parents had no idea of what kind of ability their children had even though the schools had the test scores. Information to the parent was brief, vague, rare, and couched in terms which blamed or (less often) praised the student. The Peter W. allegations of misrepresentation were not contested by the defendent; the court stated that the defendant had not related the misrepresentation to any harm suffered by the plaintiff.[76] The statutes of some states now require even more complete or frequent reporting to the parents than the federal standard. However, many states having elaborate systems of testing students feed the information to the school authorities who may use it for program revision or ignore it entirely.[77] Communications to the parents must be in the appropriate language of the parent of students as covered in the federal 94-142 legislation.[78]

Statutes which define a standard of care impose that standard upon the school district. The school district itself might establish a set of regulations or policies which the court construes to be a standard of care, which the court did in the Daniel Hoffman case. The professional employees of a school district are not personally liable for breach of that duty of care stated by law as long as they carry out the duties defined for or expected of them by the district. An individual can become liable in negligence when he does not carry out his duties expected by the employer, if that employer is immune from suit by law. The statutes of a state may limit liability to certain kinds of cases or conditions, such as bus rides. If a statute explicitly fordids recovery for damages

for educational malpractice, the individuals in the schools may not necessarily be immune. However, the unit responsible ordinarily in educational malpractice suits has been and will continue to be the school district.

Given the school district's ordinary responsibility, it must be ready to prove that it sees to the evaluation and supervision of its professional employees. State laws define the standard of knowledge and ecompetence expected of teachers. Certification has not been held to insure competence, but only to allow a person to be hired.[79] In these states requiring continuing education to maintain certification, a teacher who fails to do so may be dismissed. Maintaining certification is not proof of "efficiency" or "effectiveness". A state which requires rating of all teachers, at least once annualy, does so to encourage school districts to see to the teachers' effectiveness. There arises, then, a combination of statutory and administrative law to observe teacher effectiveness. Exercise of these laws may help a district avoid or defend itself against allegations of educational malpractice, especially if it can be shown that the district actually took action against an incompetent teacher.

Dismissals of teachers for incompetence must proceed according to due process. Districts have been upheld by courts recently for not having a "rudimentary competence" in English,[80] or failing to turn in lesson plans.[81] The Supreme Court of Nebraska enumerated a standard of competence for teachers of performance required of others executing the same or similar duties.[82] Teachers have been dismissed for a variety of reasons relating to incompetence, however, in many cases incompetence in teaching has included mention of lack of discipline exercised over pupils.[83] It

is presumed that if a teacher cannot control the students, that the treatment will not be effective. Voluntary cooperation of students is not expected.

Treatment in education still remains to be defined with respect not only to efficacy but also to what the treatment consists of. Most teaching methods are still a "black box" of process, and are difficult to communicate to a beginning teacher. It is little wonder that discussions on methodology so often fall back on which materials, or texts, are used and what the content is. Content, if it is offensive to the parents, can stimulate suits against the district or teachers, but not in malpractice.

Defenses Against Malpractice

Defenses against medical malpractice suits are well established. In medical practice, the efficacy of treatment is not guaranteed. No physician can assure the return or preservation of a patient's health, even if the patient cooperates fully.[84] If it is established that the physician used due care and diligence exercised to the average practitioners, no cause for action can be stated.

Contributory negligence is a common defense. A patient's failure to follow completely the instructions of the physician in some states is construed as contributory negligence. This principle was a defense against any finding of negligence on the part of the physician. More recently, the principle of comparative negligence has come into use; this apportions negligence between patient and physician, if indeed there is any showing of negligence on the part of the physician.[85] This principle lessens the degree of the physician's negligence in calculating damages to be received by the patient.

A patient may have contributed to negligence by failing to take proper medication,[86] or ignoring instructions to exercise or undergo other forms of rehabilitation therapy.[87] In a hospital, a patient who fails to comply with instructions may be contributory to negligence in a suit against the physician or hospital.[88] A hospital patient is required to use reasonable care for his own safety even without explicit instructions, especially if the patient is ambulatory.[89]

Every patient assumes some risk when he enters into a contract relationship with a physician to undergo careful, prudent treatment. But a patient never assumes the risk of negligent treatment. If the patient is informed of the risks ordinarily attendant upon radiation therapy, for example, he is held to assume the risk of burns, in the absence of negligent treatment.[90] A written consent form sometimes is used on which the patient affirms he is aware of the risks ordinarily attendant upon the treatment used, but such a statement cannot protect a physician from suit for negligent treatment. A patient cannot agree to waive his civil rights; including that to bring suit for damages in negligence. No document is legal which might be used as a license for negligent practice.[91]

The conditions attendant upon emergency are sometimes used as a defense in malpractice cases, but emergency treatment itself must be given with due care.

Statutes of limitations require a patient to file a suit within a given time from the date of the occurrence of the negligence. They can vary in the states from one to six years.[92] The rules for interpreting the occurrence of the negligence can vary from the time of negligent treatment, even though it is discovered after the limitation period has

expired. Another rule is to date the period of limitation from the last treatment by the negligent physician, the idea being that the negligence is a continuing process, and the date of final treatment or consultation is the time at which the time limitation begins. Another group of states use the "discovery" rule which dates the period of limitation from the time the patient realized the negligence of the treatment. The last is, of course, the one which gives maximum advantage to the plaintiff.

The defense of governmental or charitable immunity is used by hospitals in negligence cases, and is described above.[93] Defenses against educational malpractice still rests in some states on governmental immunity, complete or partial. The doctrine has receded in importance as more states' courts and legislatures abrogated it. There may, however, be a more recent trend to limit liability of governmental units.

In schools, "the failure to learn does not bespeak a failure to teach."[94] Contributory negligence in the educational malpractice actions has not been referred to as such but the principle was enunciated in the Donohue case. Teachers are expected to teach, but no law requires students to learn. So far, teachers are not held accountable for any learning or any amount of learning on the part of students. The research offers defenses to educational malpractice and may include the following:

1. Non-school influences on learning are more powerful than school influences. How much more is still open to dispute.[95]
2. The demands of larger groups of students make difficult the attention to individuals.[96]
3. Attention to skill learning may interfere with or depress affective objectives. The relationship of attitudes toward

school and cognitive learning still need investigation, but the two are related.[97]

4. The problem of determining to what extent the plaintiff fails to cooperate with the learning plan is difficult to assess, but may exist. The Donohue court recognized that "it is virtually impossible to calculate to what extent the defendant's acts or omissions proximately caused the plaintiff's inability to read at his appropriate grade level."[98] A court which accepts the proposition that negligent teaching alone causes the harm alleged to the plaintiff, thereby accepts a passive learning model, rather than an active one on the part of the plaintiff. Motivation theory is quite unclear as to what actions are we using to "turn on" learners under various circumstances.[99]

The principle of governmental immunity appears, in the light of both Donohue and Peter W. cases to be a weak reed on which to rest a defense. The more clearly statutes define what care in diagnosis and treatment are due the learner, the more the plaintiff can pinpoint what action the school should have taken to diagnose and treat the learner's difficulties. Justice Suozzi in his dissent to the Donohue opinion took the position that the existing New York laws in 1976 provided an opening to cause of action.[100]

The statutes of limitation applicable in educational malpractice do not exist. If legislative bodies construct them, they will have to be interpreted by courts in particular cases, unless they are specific, as dating from the period of the negligent treatment, or the discovery of harm to the plaintiff.

A recent Pennsylvania statute requires plaintiffs claiming damages of a political subdivision to notify, in writing, an officer of the subdivision "within 180 days of the date of origin of the claim."[101] The statute provides for liability of a governmental unit for "injury to a person on property caused by an act or omission of the political subdivision or any employee thereof . . ."[102]

Difficulties in establishing the date of negligence would pertain to the point of time of realization by the plaintiff. This time could be during the schooling process, or when the plaintiff becomes aware that he is denied a job or higher educational training opportunity which he expected to have, given his preparation, diploma, or number of years of schooling completed. The more specifically laws are constructed to require a student's attainment of levels of skills before next levels of schooling are entered, or certificates or diplomas are awarded, the easier it will be to determine the point of realization of harm.

Conclusion

To contrast group and individual models of professional liability requires the examination of the:

1. Legal nature of the relationsip between professional and client, contractual, fiduciary, or "in loco parentis."
2. The usual setting of the relationship between professional and client.
3. The control over the conditions of service, whether set by the member of the occupation, or the institution or controlling political unit.

4. The span of control of the member of the profession, whether usually one-to-one, or one-to-a group.
5. The standard duty of care owed to the client: reasonable person, professional, or statutory.
6. The standing of the occupation in common law, whether it be recognized as a profession or something less, more nearly resembling the reasonable person in such a situation.
7. The recognition of efficacy of treatment, along with limitations on expectation of cure, such recognition rested in the recognition of professional status of the occupation.

The conditions for practice of the occupation grow out of public policy and become recognized in common law. Public policy is a reflection of social expectations and the society's values. Presuming that it is possible to refer to a collection of social expectations which are recognized in common law and public policy as a model for practice, one can see the contrasts between the medical model and the model of the public school elementary or secondary teacher.

It's this commentator's position that the contrasts between the medical model and the teaching model in public basic education are so great that medical malpractice principles are not a reliable guide to an emerging law of educational malpractice. Educational malpractice, where it is recognized, will emerge with its own set of principles of fact and evidence.

There is clearly a formula for the litigation process in tort law which is applicable no matter what kind of tort is pleaded in civil law. A cause of action must be stated, due process must be observed, pre-trial

and trial processes are similar, and the process of arriving at appropriate damages for injury are all elements in the legal process. But how the facts are argued differs between the medical malpractice and educational malpractice suits.

Given the educational malpractice precedents, these conclusions may be made:

1. The liability of the school district will be argued. Bringing a case against individual teachers would be difficult because of their position as "servants."
2. The liability of the school district depends upon state statutes. Those states in which there is still governmental immunity will see few tests of the doctrine, but legal recourse is open to plaintiffs in the forms of injunction and mandamus to compel districts to remedy poor education of a student or group of students.
3. Until the relationship of the law to the processes of evaluation, measurement, diagnosis, learning theory, teaching methodology, "schools" or models is known, the courts will encounter great difficulty and reluctance in using its judgment when professionals obviously are not in agreement on what constitutes non-negligent diagnosis and treatment of the learner.
4. While the present lack of a recognized science of education appears to be an obstacle to a plaintiff's showing a cause of action, the plaintiff may show negligence on the part of a district which does not follow its own procedures for diagnosis or referral of a student with a learning difficulty.

5. As legislative bodies enact more specific laws requiring districts, or the state concerning testing of pupils, identification of competence levels, and meeting certain competence levels before promotion or graduation, the duty of care will be legislated.

Alternatives to malpractice suits exist, some of which might be more attractive to plaintiffs than lengthy judicial proceedings, and much more appropriate in arriving at remedies for educational injury. Among these are screening panels, out-of-court arbitration processes, injunctive relief, mandamus, or recourse to administrative law. Without discussing the merits of each of these I would like to move to the last mentioned possibility as a means for resolving situations of alleged negligence.

Administrative law is not new to education. Boards of education have quasi-judicial powers as hearing bodies concerning cases which touch on student and teacher rights and obligations. State boards of education and chief state school offices in some states are recognized as exercising appellate hearing powers.

In certain civil law countries, administrative judges are responsible for holding hearings in cases involving student rights, teacher rights and contentions between administrators and teachers over non-criminal professional matters.

The opinion of the court in the Donohue case stated that the plaintiff could have used administrative processes for relief, by demanding special testing and evaluation called for in the New York educational code, and following the district's failure to comply, should have appealed to the State Commissioner of Education.[103] The Commissioner's hearing powers

are extensive in New York, and can only be set aside by a court if found to be arbitrary or illegal.[104]

Procedures vary greatly from state to state for appeal from a district's alleged negligence. The hearing powers of the chief state school officer vary widely among states as do the hearing powers of the local boards and state boards of education. Few citizens are aware of the existing administrative porcesses, and when a lawyer is engaged by a plaintiff, the court remedies might appear more attractive than prolonged attempts to seek remedy through administrative processes of the district.

Administrative law has been refined in education since the Gault, Tinker, Goss-Lopez, and Wood-Strickland cases, all of which touched on requirements of procedural due process for students. Negotiations have forced districts to improve their grievance and bargaining processes. What is lacking is a set of administrative processes for the student or parent who seeks remedy for incomplete or faulty information, inadequate or faulty diagnosis and inappropriate teaching. The federal law provides elaborate procedural devices for those students covered under P.L. 94-142, and civil suits are specifically allowed to parties aggrieved by findings and decisions made under the administrative processes specified in the law.[105] Administrative law processes carry the burden of hearings, and remedies are fashioned for the purpose of increasing the student's opportunity to learn rather than in the nature of punishment to districts and their taxpayers.

Administrative judges are one alternative which ought to be explored for the purpose of hearings concerning alleged malpractice. The establishment of such a system might encourage a larger number of complaints to be

brought, but some of these complaints might have gone to court. The existence of a system of administrative judges would not shut off an appeal to the courts after the complaint had gone through administrative justice system.

Advantages of an administrative judge system would include:

1. These judges would have an expertise in assessing the relationship of educational service to the law.
2. Their judicial expertise would consist of hearing and judging complaints in the educational system.
3. Such a system will reduce the number of cases going to courts, helping to lighten a very heavy case burden.
4. Those cases proceeding from the administrative legal system to the courts would likely present better definitions of issues for the courts than at present.
5. The expense to litigants would be considerably lessened. The cost would be part of a state's education or justice budget.
6. A clearer focus on educational problems with the objective of improving the educational opportunities for students would exist than in the courtroom where the discussion of remedy shifts to monetary damages.
7. Administrative judges would make decisions which would be equal to those of court judges. Their findings would not be sent to boards as recommendations. The procedures over which they presided would be more exacting and in accord with due process requirements.

8. A body of administrative law concerning malpractice would emerge, to which school officials and plaintiffs could refer
9. The proceedings over which they presided would be less likely to be found faulty by courts on appeal. The hearings conducted by officers of the district are not recognized as formal by courts, but administrative judges would be expected to hold more formal and correct prodeedings.
10. Our political system is based on a principle of separation of powers. But administrative hearings conducted by offices of a district too often lead to confusion in roles of prosecutor and judge. After the hearing, the officer is expected to resume a role of policy maker or executor. This creates difficulties in the administration of schools in that plaintiffs or would-be plaintiffs feel threatened by facing administrators in another quasi-judicial role.[106]

Reform of the administrative structure of education has been proceeding, mostly in response to pressure from legislatures, courts, teacher organizations and general public pressures on school boards. Administrators and board members are more representative of the public and more responsive to the public than two decades ago. However, administrators and board members quite simply cannot play all the conflicting roles as adjudicators, hearing officers, system maintenance people, policy makers, negotiators, public advocates, ombudsman for students, evaluators, planners, successfully or readily. Role overload is clearly evident in the school board members and school administrator. The number of roles they are expected to play must be reduced in order for them to execute

other roles more successfully. One of the most time consuming roles of board members and administrators is that of hearing officer. It is not the most successfully executed role or the one taken most enthusiastically.

Public policy now requires hearings with increaingly fine points of procedures, in very large numbers, in school systems. These are not the school's finest hours. If the public insists on the school system attemding correctly to interpreting the constitution and laws in the treatment of students and employees, it is time to create the mechanism to allow this to be done correctly and efficiently.

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80. Adams v. Clarendon County School District No. 2, 241 S.E. 2d 897, S.C. (1978).

81. See Rosso v. Board of School Directors of the Owen J. Roberts School District, Pa. Commw. Ct. No. 1546, C.D. (1976).

82. Sanders v. Board of Educ. of South Sioux City Community School District No. 11, 263 N.W. 2d 461, Neb. (1978).

83. See Stroman v. Board of School Directors of Harrisburg School District 300 A. 2d 286, Pa. (1973); see also Mitchell v. The School District of Philadelphia, Teacher Tenure Appeal No. 28-77, In the Office of the Secretary of Education, Commonwealth of Pennsylvania (1978); and English v. North East Board of Education, 348 A. 2d 494, Pa. (1975).

84. See text accompanying notes 55, supra.

85. HOLDER, at 302.

86. Gerber v. Day, 6 P. 2d 535, Cal. (1931).

87. "Contributory Negligence: Part II," 218 J.A.M.A. 933 (1971).

88. Chamberlain v. Deaconess Hospital, 324 N.E. 2d 172, Ind. (1975).

89. Schuster v. St. Vincent Hospital, 172 N.W. 2d 421, Wisc. (1969).

90. Facer v. Lewis, 40 N.W. 2d 692, Ohio (1951).

91. Tunkl v. Regents of the University of California, 383 P. 2d 441, Cal. (1963).

92. HOLDER, at 321.

93. See text accompanying notes 34 and 36, supra.

94. Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874, 881 (1978).

95. See Id.

96. See Id. at 879.

97. N. OZURUMBA, AN EXAMINATION OF THE VARIABLES INFLUENCING THE SCORES OF RURAL ELEMENTARY SCHOOLS ON SELF-ESTEEM (1978). Unpublished Ph.D. thesis in Pennsylvania State University Library.

98. Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874, 881 (1978).

99. B. Weiner, "An Attributional Approach For Educational Psychology" in 4 REVIEW OF RESEARCH IN EDUCATION (1976).

100. Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874, 881-884 (1978).

101. Pa. Act No. 1978-330, Sec. 504(a) (1978).

102. Id., Sec. 201.

103. Donohue v. Copiague Union Free School District, 407 N.Y.S. 2d 874, 880-881 (1978).

104. 2 McKinney's Session Laws of N.Y. 2450 (1976).

105. Pub. L. No. 94-142, Sect. 615(e) (1975).

106. R. LORCH, DEMOCRATIC PROCESS AND ADMINISTRATIVE LAW, at 211-212 (1969).